# Modern Freight Express v Afzarizzal bin Abdul Wahab & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-371–09 OF 2016
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
13 APRIL 2017

*Customs and Excise — Seizure — Seizure of goods — Appeal against the High Court decision — Appellant's goods seized by Enforcement Division of Customs Department — Respondents neither released goods nor did they refer appellant's claim to magistrate's court after expiration of one month from date of notice claim — Whether s 128 of the Customs Act 1967 did not make provision for prosecution to be brought within one month — Whether goods deemed forfeited — Customs Act 1967 s 128*

On or about 16 and 17 September 2015, the appellant was appointed and instructed by six different consignors to take possession and to manage the declaration, clearance and shipping of the consignments of 'Beer and Apple Cider' ('the said good'). For purposes of removing the said goods in stages to Singapore, the appellant had made the necessary declaration of the said goods in the prescribed forms which was duly approved by the Lembaga Pelabuhan Klang ('LPK'). On 13 November 2015 the appellant was informed that the said goods, conveyed in 40 containers, had been seized by the Enforcement Division of the Customs Department on 9 November 2015. At the material time, the first respondent, a senior officer, was assistant director in the Enforcement Division, Customs Department, Selangor. By a letter dated 19 November 2015, the appellant made a claim to the second respondent, State Director of Customs, Selangor, pursuant to s 128 of the Customs Act 1967 ('the Act'), demanding the release of the said goods. The respondents did not release the goods, neither did they refer the appellant's claim to the magistrate's court for a decision after the expiration of one month from the date of notice claim. However, on 30 November the appellant received a notice of seizure dated 27 November 2015 issued by the first respondent pursuant to s 114 of the Act. The notice stated, among others, 'sebarang tuntutan hendaklah dikemukakan secara bertulis dalam tempoh satu bulan dari tarikh penerimaan notis ini'. Vide letter dated 30 November 2015, the appellant made a claim for the release of the goods. The respondent failed to release the goods and failed to refer to the magistrate court. The appellant contended that the continuous seizure of the said goods was made without any reasonable and probable cause and that the respondents had a statutory duty to refer the appellant's claim to the magistrate court for a decision on the expiry of one calendar month from the date of seizure of the said goods. Hence, the appellant

filed an originating summons against the respondents in the High Court. The learned judicial commissioner held, among others: (a) s 128 of the Act did not make a provision for a prosecution to be brought within one month; (b) continuous seizure did not arise because the first respondent had yet to decide whether the goods were deemed forfeited; (c) the Director General may only direct a senior officer to refer to court when the senior officer had made a decision that the goods were deemed forfeited and the matter had been referred to the director general for his directive; and (d) that the written claim for the goods made by the appellant was not a valid claim as it was not done personally by the appellant. Aggrieved, the appellant appealed the decision. The respondents averred that the said goods could not be released to the appellant because the appellant failed to attend an inquiry to ascertain its ownership of the said goods. The issue for consideration here was whether upon receiving the appellant's written claim for the seized goods within one calendar month period, the respondents who had refused to release the goods must refer the matter to the court who would determine the ownership by way of proceedings under sub-s 128(4) and (5).

**Held,** allowing the appeal with costs and remitting case to the High Court for assessment of damages under prayer 2 of the appellant's application:

(1) There was no merit to the respondent's averment that the appellant must be 'pemunya yang sah' and that 'rujukan ke mahkamah hanya akan dibuat setelah tuntutan pemunya yang sah menuntut barangan tersebut dalam masa 1 bulan dari tarikh penyitaan barangan tersebut'. The words 'asserting that he is the owner' in sub-s 128(2) were wider than 'lawful owner' ('pemunya yang sah'). An unnecessarily restrictive interpretation ought not be accorded to the words specified in s 128(2) (see para 34).

(2) The written claim made by the appellant was a valid claim as provided under sub-s 128(2) of the Act, particularly when the respondents had not objected nor disputed the notice to claim from the appellant at any point in time. It was an undisputed fact that the seizure notice issued under s 114 of the Act was served by the first respondent on the appellant. Therefore, the court found that the learned judicial commissioner erred when she ruled that the claim by the appellant was not a valid claim for the said goods (see para 35).

(3) Pursuant to sub-s 128(3) of the Act, where a written claim was made by the appellant for the said good within one calendar month from the date of seizure and where no prosecution had commenced in respect of the said goods within the same period of time, then on the expiration of the one calendar month from the date of notice of claim, the respondent should release the goods or refer the claim to the magistrate court. As the respondent had failed to do either, the respondents have failed to observe the statutory requirements under s 128 of the Act (see para 37).

(4) The learned judicial commissioner erred in her finding that the appellant's application was premature and misconceived as the senior officer of customs had yet to decide on forfeiture of the goods and that the director general may only direct the senior officer of customs to refer the matter to court when the senior officer had made a decision that the goods were deemed forfeited and the senior officer referred the matter to the director general for his directive. There need not be a decision by the senior officer that the goods were deemed forfeited as the forfeiture occurred by operation of law, namely the three situations stated in s 128(1)(a)–(c) did not occur before the expiration of one month from the date the said goods were seized (see paras 38–39).

**[Bahasa Malaysia summary**

Pada atau kira-kira 16 dan 17 September 2015, perayu dilantik dan diarahkan oleh enam pemberi konsain yang berbeza untuk mengambil milikan dan menguruskan deklarasi, pelepasan dan penghantaran konsainan 'Beer and Apple Cider' ('barang-barang tersebut'). Bagi tujuan menghantar barang-barang tersebut secara berperingkat ke Singapura, perayu telah membuat deklarasi perlu terhadap barang-barang tersebut di dalam borang yang ditetapkan yang mana telah diluluskan dengan sewajarnya oleh Lembaga Pelabuhan Klang ('LPK'). Pada 13 November 2015 perayu diberitahu bahawa barang-barang tersebut, dibawa di dalam 40 kontena, telah dirampas oleh Bahagian Penguatkuasaan Jabatan Kastam pada 9 November 2015. Pada masa material, responden pertama, pegawai kanan, adalah timbalan pengarah di dalam Bahagian Penguatkuasaan Jabatan Kastam, Selangor. Melalui surat bertarikh 19 November 2015, perayu membuat tuntutan kepada responden kedua, Pengarah Kastam Negeri Selangor, berikutan kepada s 128 Akta Kastam 1967 ('Akta'), menuntut pelepasan barang-barang tersebut. Responden-responden tidak melepaskan barang-barang tersebut, mereka juga tidak merujuk kepada tuntutan perayu kepada mahkamah majistret untuk keputusan selepas tamat satu bulan dari tarikh notis tuntutan. Walau bagaimanapun, pada 30 November perayu menerima notis perampasan bertarikh 27 November 2015 dikeluarkan oleh responden pertama berikutan s 114 Akta. Notis menyatakan, antara lain, 'sebarang tuntutan hendaklah dikemukakan secara bertulis dalam tempoh satu bulan dari tarikh penerimaan notis ini'. Melalui surat bertarikh 30 November 2015, perayu membuat tuntutan untuk pelepasan barang-barang tersebut. Responden gagal untuk melepaskan barang-barang tersebut dan gagal untuk merujuk kepada mahkamah majistret. Perayu berhujah bahawa perampasan berterusan barang-barang tersebut dibuat tanpa apa-apa kausa munasabah dan barangkali dan bahawa responden-responden mempunyai tugas statutori untuk merujuk tuntutan perayu kepada mahkamah majistret bagi keputusan atas tempoh tamat satu bulan kalendar dari tarikh perampasan terhadap barang-barang tersebut. Maka, perayu memfailkan saman pemula terhadap responden-responden di Mahkamah Tinggi. Pesuruhjaya kehakiman yang

bijaksana memutuskan, antara lain: (a) s 128 Akta tidak membuat peruntukan bagi pihak pendakwaan untuk dibawa dalam masa satu bulan; (b) perampasan berterusan tidak berbangkit kerana responden pertama belum memutuskan sama ada barang-barang tersebut adalah dianggap dirampas; (c) ketua pengarah hanya boleh mengarah pegawai kanan untuk merujuk kepada mahkamah apabila pegawai kanan telah membuat keputusan bahawa barang-barang tersebut adalah dianggap dirampas dan perkara tersebut telah dirujuk kepada ketua pengarah bagi arahannya; dan (d) bahawa tuntutan bertulis bagi barang-barang tersebut dibuat oleh perayu adalah tuntutan tidak sah kerana ia tidak dibuat secara peribadi oleh perayu. Tidak puas hati, perayu merayu terhadap keputusan tersebut. Responden-responden berhujah bahawa barang-barang tersebut tidak boleh dilepaskan kepada perayu kerana perayu gagal untuk menghadiri siasatan untuk memastikan pemilikannya terhadap barang-barang tersebut. Isu untuk pertimbangan di sini adalah sama ada setelah menerima tuntutan bertulis perayu bagi barang-barang yang diraampas dalam masa tempoh satu bulan kalendar, responden-responden yang enggan melepaskan barang-barang tersebut mesti merujuk perkara tersebut kepada mahkamah yang akan menentukan pemilikan melalui prosiding di bawah sub-s 128(4) dan (5).

**Diputuskan,** membenarkan rayuan dengan kos dan meremit kes kepada Mahkamah Tinggi untuk penilaian ganti rugi di bawah permohonan 2 permohonan perayu:

(1) Tidak terdapat merit kepada hujahan responden-responden bahawa perayu mesti adalah 'pemunya yang sah' dan bahawa 'rujukan ke Mahkamah hanya akan dibuat setelah tuntutan pemunya yang sah menuntut barangan tersebut dalam masa satu bulan dari tarikh penyitaan barangan tersebut'. Perkataan-perkataan 'asserting that he is the owner' di dalam sub-s 128(2) adalah lebih luas daripada 'lawful owner' ('pemunya yang sah'). Tafsiran terhad yang tidak perlu tidak patut diberikan kepada perkataan-perkataan yang dinyatakan di dalam s 128(2) (lihat perenggan 34).

(2) Tuntutan bertulis yang dibuat oleh perayu adalah tuntutan sah seperti yang diperuntukkan di bawah sub-s 128(2) Akta, terutamanya apabila responden-responden tidak membantah ataupun mempertikaikan notis tuntutan daripada perayu pada bila-bila masa. Ia adalah fakta yang tidak dipertikaikan bahawa notis perampasan yang dikeluarkan di bawah s 114 Akta diserahkan oleh responden pertama ke atas perayu. Mahkamah oleh itu mendapati bahawa pesuruhjaya kehakiman yang bijaksana tersilap apabila beliau memutuskan bahawa tuntutan oleh perayu bukan tuntutan sah untuk barang-barang tersebut (lihat perenggan 35).

(3) Berikutan sub-s 128(3) Akta, di mana tuntutan bertulis dibuat oleh perayu bagi barang-barang tersebut dalam masa satu bulan kalendar dari

tarikh perampasan dan di mana tiada pendakwaan telah dimulakan berkaitan barang-barang tersebut dalam tempoh masa yang sama, dengan itu atas tamatnya tempoh satu bulan kalendar dari tarikh notis tuntutan, responden-responden patut melepaskan barang-barang tersebut atau merujuk tuntutan tersebut kepada mahkamah majistret. Memandangkan responden-responden telah gagal berbuat kedua-duanya, responden-responden telah gagal untuk memerhati kehendak statutori di bawah s 128 Akta (lihat perenggan 37).

(4) Pesuruhjaya kehakiman yang bijaksana tersilap dalam dapatannya bahawa permohonan perayu adalah pramatang dan salah tanggap kerana pegawai kanan Kastam belum lagi memutuskan atas perampasan barang-barang tersebut dan bahawa ketua pengarah hanya boleh mengarah pegawai kanan kastam untuk merujuk perkara tersebut kepada mahkamah apabila pegawai kanan telah membuat keputusan bahawa barang-barang tersebut adalah dianggap dirampas dan pegawai kanan merujuk perkara tersebut kepada ketua pengarah bagi arahannya. Tidak perlu terdapat keputusan oleh pegawai kanan bahawa barang-barang tersebut dianggap dirampas kerana perampasan berlaku oleh operasi undang-undang, iaitu tiga keadaan yang dinyatakan dalam s 128(1)(a)–(c) tidak berlaku sebelum tamatnya tempoh satu bulan dari tarikh barang-barang tersebut dirampas (lihat perenggan 38–39).]

**Notes**

For cases on seizure in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 226–232.

**Cases referred to**

*Assan bin Mohammad & Ors v Hock Huat Chan Sdn Bhd* [2013] 5 MLJ 76, CA (refd)

*Hock Huat Chan Sdn Bhd v Assan bin Mohammad & Ors* [2008] MLJU 92, HC (distd)

*Mehdi Dadashi Havadaragh v Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors* [2015] 4 MLJ 646, CA (folld)

*Soon Chee Keong v PP* [1951] 17 MLJ 5 (folld)

*Suntharaju Pachayappan v Jabatan Kastam Diraja Malaysia* [2010] 3 CLJ 865, HC (folld)

*The Director General of Customs Malaysia and The Director of Customs, Sarawak & Ors v Chong Yin Kim Trading Sdn Bhd & Ors and another appeal* [2016] 12 MLJ 274; [2016] 9 CLJ 130, HC (distd)

**Legislation referred to**

Customs Enactment 1937 s 108
Free Zone Act 1990
Customs Act 1967 ss 2, 114, 114(1), 128, 128(1), (1)(a), (1)(b), (1)(c),

(2), (3), (4), (5), 132, 133(1)(e), 135(1)(e) A

**Appeal from:** Originating Summons No BA-24–49–01 of 2016 (High Court, Shah Alam)

*JR Ravendren (Janeni Devi Revendren with him) (JR Ravendren & Assoc) for the appellant.* B
*Norliza Zulkifli (Hani Aziza Ismail with her) (Federal Counsel, Selangor State Legal Advisor Office) for the respondents.*

**Tengku Maimun JCA (delivering judgment of the court):** C

**[1]** This appeal concerns s 128 of the Customs Act 1967 ('the Act') which reads:

128 Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month. D

(1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph 115(1)(c) shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration — E

(a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

(b) a written application is made for the return of such goods under paragraph 115(1)(a) or (b); or F

(c) such goods are returned under the said paragraph (a) or (b).

(2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same. G

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be, be released or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision. H I

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear

A before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against that Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the
B commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secure under paragraph 115(1)(a) or (b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.

C (5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

D THE BACKGROUND FACTS

**[2]** The chronological events leading to the dispute in this appeal, as disclosed in the affidavits filed by the respective parties are as follows.

E **[3]** On or about 16 September 2015 and 17 September 2015, the plaintiff was appointed and instructed by six different consignors to take possession and to manage the declaration, clearance and shipping of the consignments of 'Beer and Apple Cider' ('the said goods').

F **[4]** The said goods, conveyed in 40 containers, were shipped by the consignors from Vietnam to the Northport, Port Klang to be shipped in stages to the respective consignees in Singapore.

G **[5]** Pursuant to the Free Zone Act 1990, Northport, Port Klang is a free zone area where the said goods is not subjected to payment of any customs duty or taxes when the said goods were brought into the free zone area from outside Malaysia. The authority responsible for the administration, management and operation of all activities in the Northport free zone including permitting the
H movement of goods into and out of the free zone area is the Port Klang Authority or Lembaga Pelabuhan Klang ('LPK').

**[6]** For purposes of removing the said goods in stages to Singapore based on the availability and confirmation of the vessels, the plaintiff had made the
I necessary declaration of the said goods in the prescribed forms which was duly approved by the LPK.

**[7]** On 13 November 2015, the plaintiff, upon making an enquiry with the customs officer at the enforcement division, was informed that the said goods

in the 40 containers had been seized by the enforcement division of the customs department on 9 November 2015. At the material time, the first defendant was the senior officer of customs, holding the post of an assistant director in the Enforcement Division, Customs Department, Selangor.

**[8]** By a letter dated 19 November 2015, the plaintiff through its solicitors, made a claim to the State Director of Customs, Selangor ('the second defendant') pursuant to s 128(1) of the Act, demanding the release of the said goods. The defendants did not release the goods. Neither did the defendants refer the plaintiff's claim to the magistrate's court for decision after the expiration of one month from the date of the notice of claim.

**[9]** On 30 November 2015, the plaintiff however received a notice of seizure dated 27 November 2015 issued by the first defendant pursuant to s 114 of the Act. The notice which was specifically addressed to the plaintiff, stated among others that 'sebarang tuntutan hendaklah dikemukakan secara bertulis dalam tempoh satu bulan dari tarikh penerimaan notis ini'.

**[10]** Vide a letter dated 30 November 2015, the plaintiff through its solicitors made a claim for the release of the said goods. The defendants failed to release the said goods and failed to refer the matter to the magistrate court. There was no prosecution preferred against the plaintiff in respect of the said goods.

**[11]** The plaintiff contended that the continuous seizure of the said goods was made without any reasonable and probable cause and that the defendants have a statutory duty to refer the plaintiff's claim to the magistrate court for decision on the expiry of one calendar month from the date of seizure of the said goods.

**[12]** On 14 January 2016, the plaintiff filed an originating summons against the defendants in the High Court at Shah Alam seeking the court's determination on the following questions:

(1) Samada berdasarkan kepada satu pentafsiran yang benar dan tepat terhadap subseksyen 128(3) dan subseksyen 128(4) Akta Kastam 1967 (Akta 235) bahawasanya dalam keadaan dimana tiada pendakwaan dijalankan dan dimana tuntutan sewajarnya dibuat oleh plaintif terhadap 'Beer' (selepas ini dirujuk sebagai 'barang tersebut') didalam 40 buah kontena masing-masing seperti di Lampiran 'A', yang disita oleh defendan-defendan pada 9.11.2015, defendan-defendan yang gagal dan/enggan melepaskan barang tersebut adalah tidak berkuasa disisi undang-undang untuk terus menyita barang tersebut selepas tamat tempoh satu bulan kalender dari tarikh penyitaan tanpa dirujuk kepada Mahkamah adalah menyalahi undang-undang; dan

(2) Samada berdasarkan kepada satu pentafsiran yang benar dan tepat terhadap subseksyen 128(3) Akta Kastam 1967 (Akta 235), kegagalan dan/atau keengganan defendan-defendan untuk melepaskan barang tersebut kepada plaintif dan kegagalan dan/atau keengganan defendan-defendan untuk merujuk tuntutan plaintif terhadap barang tersebut kepada Mahkamah selepas tamatnya 1 bulan kalendar dari tarikh penyitaan barang tersebut hanya menjadikan penyitaan barang tersebut sebagai tidak sah.

**[13]** Consequent to the above, the plaintiff prayed for the following reliefs:

(1) Satu deklarasi bahawa penyitaan barang tersebut oleh defendan pertama adalah menyalahi undang-undang dan dengan demikian tidak sah.

(2) Gantirugi khas, gantirugi am dan gantirugi teladan ditaksir oleh Pendaftar Mahkamah yang mulia ini dan dibayar oleh defendan-defendan kepada plaintif.

(3) Faedah pada kadar 5% atas jumlah gantirugi yang diperintahkan dibawah Perenggan 2 diatas dari tarikh penyitaan barang tersebut sehingga penyelesaian penuh.

(4) Kos permohonan ini dibayar oleh Defendan-defendan.

(5) Lain-lain relif selanjutnya yang Mahkamah Mulia ini dianggap sesuai dan adil.

**[14]** In opposing the plaintiff's application, the defendants, through its enforcement officer, Ranjit Singh Hardev, affirmed an affidavit, the material averments read (*rekod rayuan Jld* 1: p 50):

13. ... Defendan-Defendan tidak boleh menyerahkan barangan tersebut kerana kegagalan Plaintif hadir untuk siasatan bagi mengesahkan Plaintif adalah pemunya barangan tersebut seperti yang dikehendaki di bawah seksyen 128(1) Akta 235.

14. ...

15. ... bagi semua 40 borang K4 yang diikrarkan tidak merujuk Plaintif sebagai pemunya dan kegagalan Plaintif untuk hadir siasatan juga tidak mengesahkan Plaintif sebagai pemunya barangan tersebut di bawah seksyen 128 Akta 235.

16. ... Defendan-Defendan menyatakan bahawa kegagalan barangan diserahkan kepada Plaintif adalah berpunca semata-mata Plaintif yang gagal hadir untuk siasatan bagi mengesahkan barangan tersebut adalah kepunyaannya.

17. ... Defendan-Defendan ... menyatakan bahawa rujukan ke Mahkamah hanya akan dibuat setelah tuntutan pemunya yang sah menuntut barangan tersebut dalam masa 1 bulan dari tarikh penyitaan barangan tersebut.

FINDINGS OF THE HIGH COURT

**[15]** Having considered the contentions of the parties, the learned judicial commissioner held, among others that:

(a) s 128 of the Act does not make a provision for a prosecution to be brought within one month;

(b) the issue of continuous seizure does not arise because the senior officer of customs has yet to decide whether the goods are deemed to be forfeited;

(c) that the director general may only direct the senior officer of customs to refer to court when the senior officer of customs had made a decision that the goods are deemed forfeited and the senior officer refers the matter to the director general for his directive; and

(d) that the written claim for the goods made by the solicitor on 19 November 2015 on behalf of the plaintiff was not a valid claim as it was not done personally by the plaintiff.

**[16]** For ease of reference, the relevant findings and conclusions of the learned judicial commissioner are reproduced below (*rekod rayuan tambahan*: pp 37–41):

> [38] Plaintif telah menghujahkan bahawa Defendan-Defendan berkewajipan untuk merujuk perkara penyitaan kepada mahkamah sekiranya tiada pendakwaan dibawa selepas satu bulan dari tarikh penyitaan. Mahkamah ini perlu menekankan bahawa Plaintif sebenarnya khilaf mengenai undang-undang berkaitan Seksyen 128 khasnya subseksyen 128(1) dan subseksyen 128(3). Pertamanya, Plaintif telah khilaf berkenaan bahawa tempoh satu bulan yang dinyatakan di dalam subseksyen 128(3), tempoh satu bulan itu bukanlah bagi maksud pendakwaan mestilah dijalankan dalam tempoh satu bulan dari tarikh penyitaan tetapi tempoh masa itu adalah bagi maksud hak tanggapan perlucutan hak. Keduanya berkenaan rujukan kepada Mahkamah. Subseksyen 128(3) seterusnya memperuntukkan bahawa sekiranya pegawai kanan kastam membuat keputusan bahawa barang dagangan atau hasil jualannya dianggap dilucutkan, ia hendaklah merujuk kepada Ketua Pengarahnya yang boleh mengarahkan samada barang dagangan atau hasil jualan tersebut dilepaskan dengan sekuriti di bawah Seksyen 115 ATAUPUN merujuk kepada Majistret Kelas Pertama.
>
> [39] Mahkamah ini perlu juga menekankan di sini menurut subseksyen 128(3) Akta 235, Ketua Pengarah hanya boleh mengarah rujukan kepada mahkamah setelah keadaan-keadaan ini berlaku:
>
> (i) *tempoh penahanan dan penyitaan telah melampaui satu bulan dari tarikh penyitaan dan tiada pendakwaan dibawa, dan*
>
> (ii) *pegawai kanan kastam telah membuat keputusan bahawa barang dagangan itu dianggap dilucutkanhak, dan*

(iii) *pegawai kanan kastam merujuk perkara ini kepada Ketua Pengarah untuk arahannya*. (Penekanan ditambah.)

[40] Di dalam kes ini, keadaan dalam item (ii) dan item (iii) masih belum berlaku, di mana pegawai kanan kastam masih belum membuat keputusan untuk anggapan perlucutanhak barang dagangan di dalam 40 kontena tersebut, makanya prosidur lucut hak belum terlaksana untuk pegawai kanan kastam merujuk kepada Ketua Pengarahnya bagi arahan-arahan beliau.

[41] ...

[42] Berdasarkan pembacaan peruntukan sebenar subseksyen 128(3) Akta 235, Plaintif telah nyata khilaf di dalam pembacaannya. Oleh itu adalah menjadi dapatan Mahkamah ini soalan undang-undang yang diajukan oleh Plaintif adalah satu soalan yang salah tanggap dan pra-matang kerana di dalam kes ini persoalan atau isu penahanan berterusan tidak wujud kerana bagi barang dagangan di dalam 40 kontena yang disita semenjak 9.11.2015 walaupun telah melampaui tempoh satu bulan, pegawai kanan kastam masih belum membuat keputusan untuk ianya (barang dagangan tersebut) dianggap dilucutkan bagi tindakan seterusnya diambil. Justeru, di dalam keadaan kes ini tidak timbul persoalan mengenai wujudnya penahanan barangan tersebut secara berterusan adalah sesuatu bertentangan dengan undang-undang dan menjadikan penyitaan barangan itu menjadi tak sah.

[43] Memandangkan soalan-soalan undang-undang yang diajukan Plaintif adalah berdasarkan pembacaan salah akan peruntukan Seksyen 128 Akta 235 maka kedua-dua soalan tersebut tidak perlu dijawab oleh Mahkamah ini kerana Mahkamah ini telah menerangkan secara terperinci pembacaan sebenar Seksyen 128 Akta 235. Atas alasan ini sahaja, Plaintif sememangnya tidak berhak untuk deklarasi yang dipohon dan permohonannya di Kandungan 1 hendaklah ditolak.

**[17]** Aggrieved, the plaintiff appealed to this court. We heard the appeal and had unanimously allowed it. We now give our reasons.

## THE APPEAL

**[18]** Notwithstanding the numerous grounds of appeal listed in the memorandum of appeal and the various issues raised by learned counsel for the appellant/plaintiff, to our mind, the issue for our consideration was simply this: whether upon receiving the plaintiff's written claim for the seized goods within the one calendar month period, the defendants who had refused to release the goods must refer the matter to the court who would determine the ownership by way of proceedings under sub-s 128(4) and (5) of the Act.

**[19]** In essence, before us, learned counsel for the plaintiff's argument was that the learned judicial commissioner had fundamentally erred and misdirected herself in law in the interpretation and application of s 128 of the Act. In support of his argument, learned counsel relied among others, on the following authorities:

(a) *Sunthararaju Pachayappan v Jabatan Kastam Diraja Malaysia* [2010] 3 CLJ 865;

(b) *Soon Chee Keong v Public Prosecutor* [1951] 17 MLJ 5; and

(c) *Mehdi Dadashi Havadaragh v Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors* [2015] 4 MLJ 646.

**[20]** In urging this court to affirm the decision of the learned judicial commissioner, learned senior federal counsel ('SFC') for the defendants on the other hand, cited the following cases:

(a) *The Director General of Customs Malaysia and The Director of Customs, Sarawak & Ors v Chong Yin Kim Trading Sdn Bhd & Ors and another appeal* [2016] 12 MLJ 274; [2016] 9 CLJ 130; and

(b) *Hock Huat Chan Sdn Bhd v Assan bin Mohammad & Ors* [2008] MLJU 92.

OUR FINDINGS

**[21]** Having read the written submissions and having heard the parties orally, we decided in favour of the plaintiff as we found that the authorities are clearly in support of the plaintiff.

**[22]** As for the two cases cited by learned SFC, we observed that the factual background was different from the instant appeal and that they were not specifically concerned with the interpretation of s 128 of the Act.

**[23]** In the case of *The Director General of Customs Malaysia and The Director of Customs, Sarawak & Ors v Chong Yin Kim Trading Sdn Bhd & Ors and another appeal* [2016] 12 MLJ 274; [2016] 9 CLJ 130, the customs department seized certain goods in the premise of the first respondent. Subsequently, the respondents filed a notice of motion for the release of the goods. The sessions court judge ordered the release of the goods where she concluded that the failure of the appellants, among others, to initiate a prosecution within one month of the seizure was fatal.

**[24]** On appeal to the High Court, the learned judge considered the distinction between ss 128 and 114 of the Act where it was held that s 128 does not stipulate that the prosecution of the offence for the goods seized must be done within one month from the date of the seizure. Section 128 only deemed forfeiture of the goods seized if there was no prosecution within one month from the date of the seizure unless the three situations as stated in s 128(1)(a)–(c) happened. The High Court found that the release of the goods could not be said to be wrong because s 115 of the Act allows such release. The

order of release of the goods was therefore affirmed by the High Court.

**[25]** In *Hock Huat Chan Sdn Bhd*, the High Court had to consider the provisions under s 114(1) and s 132 of the Act on the two tests concerning seizures. The plaintiff who had not made a claim within one month from the date the goods were seized, challenged the defendants' seizures as without 'reasonable or legal ground or reasonable or probable cause'. The High Court ruled that there is no difference in the two tests but on the facts found that the seized goods were not properly forfeited and ordered for the plaintiff's claim of ownership to be adjudicated before the magistrate court as provided under s 128(4) of the Act.

**[26]** For the appellant, one of the cases relied upon was *Soon Chee Keong* where Taylor J, in considering s 108 of the Customs Enactment 1937 (the predecessor to s 128 of the Act) said at p 6:

> Section 108 provides that when any goods are seized, notice shall forthwith be given to the owner, unless he or his agent knows about it already. If there is no prosecution, or if there is a prosecution but the Magistrate does not forfeit, and if the goods are not claimed within one month, then they are forfeited automatically by operation of law. ...
>
> ...
>
> Where a claim is made it must first be considered by the Comptroller who may release the goods but cannot forfeit them. This covers cases of seizure on suspicion where circumstances are afterwards explained to the satisfaction of the Comptroller. It he does not release, he must refer the matter to Court.

**[27]** The other authority was *Sunthararaju* where the plaintiff and two other persons were arrested by police officers together with nine buffaloes which were loaded on the plaintiff's motor-lorry ('the seized goods'). The nine buffaloes were later handed over to the defendant. The plaintiff was subsequently served with a notice of seizure and he was informed that he was suspected of committing offence(s) under s 133(1)(e) or 135(1)(e) of the Act. Upon receiving the said notice, the plaintiff submitted two statutory declarations to the defendant and made a claim for the return of the seized goods.

**[28]** Having received the plaintiff's claim, the defendant did not take any step to refer the matter to the court. The plaintiff filed an originating summons claiming for a declaration that the notice of seizure was null and void and ultra vires the provisions of the Act. Mohd Sofian Abd Razak J said at p 875 of the report:

> [21] In the instant case the learned counsel for the plaintiff's main thrust of his case is the failure to refer the matter to the magistrate within one calendar month and did not submit on the fact whether upon receipt of the notice of claimant within one calendar month refer to the Director General of Customs for his decision as to

whether to release the seized goods or to direct such senior officer of customs to refer the matter to the magistrate for his decision. Be that as it may, there is no evidence before the court that the claim by the plaintiff was referred to the Director General ('controller') for him to make a decision within the one calendar month ('plaintiff's view') or after the expiry of one calendar month ('defendant's view') either to release the seized goods or may direct such senior officer of customs to refer the matter to the magistrate for his decision.

[22] With respect, the court cannot agree with the views expressed by the learned SFC on the interpretation of s 128(3) of the Act. The learned SFC in his submission dealt only with the issue that the referring of the matter to the magistrate can be made after the expiry of the one calendar month but did not address the point that the Director General ('controller') has to made a decision first as to what to do with the plaintiff's claim. This then would be in line with decision of *Soong Chee Kong*. It was only after the plaintiff had filed this application (encl 1) that the learned SFC had urged the court to dismiss the plaintiff's application and direct that an inquiry before the magistrate be held. In fact the learned counsel for plaintiff informed the court that the defendant had served a summons on the solicitors and asked the plaintiff to be present at the Magistrate's Court Kuala Nerang on 12 October 2009 to show reasonable cause why the seized goods should not be forfeited ... With respect, the court with reluctance is unable to accede to the learned SFC's request as it would be a great injustice to the plaintiff.

[23] Based on the reasons adumbrated above, the court is of the opinion that the defendant has failed to comply with the provisions of s 128(3) of the Act in that the Director General of Customs has to make a decision whether to release the seized goods or direct such senior officer of customs to refer the matter to the magistrate for his decision. The court agrees that the decision to refer the matter to the magistrate must be made within the one calendar month from the date of receipt of the notice of claimant which has to be served on the defendant within one calendar month from the date of receipt of the notice of seizure by the plaintiff. The upshot is that the plaintiff's application in encl 1 is allowed with costs.

**[29]** The decision of the High Court in *Sunthararaju* was affirmed by this court. In dismissing the defendant's appeal, this court delivered its ex tempore judgment as follows (Civil Appeal No K-01–368 of 2009):

The facts clearly show that Appellant had not complied with section 128(3) which requires the Appellant to make a decision whether to release the seized goods or direct such senior officer of Customs to refer the matter to the magistrate for decision.

**[30]** Dissatisfied with the decision of this court, the defendant filed an application for leave to appeal to the Federal Court vide Civil Application No 08(f)-179–03 of 2012. The affidavit in support of the application for leave stated among others that:

6. ... Yang Arif Hakim Mahkamah Tinggi Alor Setar telah membenarkan permohonan Responden dengan memberi tafsiran undang-undang bahawa menurut peruntukan subseksyen 128(3) Akta Kastam 1967, pihak Pemohon

A hendaklah merujuk perkara mengenai rampasan barang-barang atau hasil jualan barang-barang rampasan tersebut kepada seorang Majistret dalam tempoh masa satu (1) bulan dari tarikh penerimaan tuntutan bertulis dari tuanpunya.

7. ... dalam menolak rayuan Pemohon, Mahkamah Rayuan telah terkhilaf dalam pentafsiran undang-undang berhubung seksyen 128(3) Akta Kastam 1967 apabila B mengesahkan keputusan Yang Arif Hakim Mahkamah Tinggi Alor Setar.

8. ...

9. ...

10. ...

C 11. ... Pemohon membangkitkan persoalan undang-undang berikut untuk pertimbangan Mahkamah yang Mulia ini:

(i) Sama ada atas pentafsiran sebenar subseksyen 128(3) Akta Kastam 1967, Ketua Pengarah Kastam adalah dikehendaki untuk merujuk perkara D mengenai rampasan barang-barang atau hasil jualan barang-barang rampasan tersebut kepada seorang Majistret dalam tempoh satu bulan dari tarikh seorang pegawai atasan kastam menerima tuntutan bertulis menuntut hak pemunyaan atau hasil jualan barang-barang rampasan tersebut di bawah subseksyen 128(2) Akta Kastam 1967 dalam hal keadaan di mana tiada pendakwaan.

E (ii) Sama ada atas pentafsiran sebenar subseksyen 128(3) Akta Kastam 1967, kegagalan Ketua Pengarah Kastam untuk menjalankan tugasnya di bawah subseksyen tersebut akan membawa kesan bahawa notis penyitaan barang-barang yang dikeluarkan di bawah seksyen 114 Akta Kastam 1967 diisytiharkan tidak sah dan barang-barang rampasan dipulangkan kepada F tuanpunya.

Leave was refused by the Federal Court.

**[31]** Reverting to the facts of the instant appeal, the defendants averred that G the said goods could not be released to the plaintiff because the plaintiff failed to attend an inquiry to ascertain its ownership of the said goods.

**[32]** In response, the plaintiff through one Viknesvaran a/l Poogavanam stated as follows (*rekod rayuan Jld* 1: p 57):

H 11. Sebagai menjawab perenggan 13, 14, 15 dan 16 ADJ tersebut, saya menyatakan bahawa pada 8.1.2016 saya bagi pihak plaintif telah hadir bersama-sama peguamcara saya dipejabat Penolong Pengarah Kastam En Engku Hanif bin Engku Ismail di pejabat defendan pertama di Wisma Kastam, Pelabuhan Klang untuk mengesahkan tuntutan plaintif keatas barang tersebut didalam 40 kontena tersebut. I Maka pengataan defendan-defendan bahawa plaintif gagal hadir untuk siasatan adalah tidak benar dan tepat.

**[33]** There was no denial by Engku Hanif bin Engku Ismail as regards the plaintiff's averment quoted above and neither was there any averment by the

defendants' earlier deponent that there was no such officer and therefore Engku Hanif bin Engku Ismail could not have attended to the plaintiff as averred to above. The defendants have therefore failed to rebut the plaintiff's averment on the issue of inquiry. In any event, the notice of seizure dated 27 November 2015 issued by the defendants was served on the plaintiff where the plaintiff had been specifically notified to make a written claim within one month. We therefore failed to comprehend the stand taken by the defendants as posited in their affidavit.

**[34]** Quite apart from the above, sub-s 128(2) expressly provides that 'any person asserting that he is owner of such good' has a right to claim the goods. The words 'asserting that he is owner' in our view are wider than 'lawful owner' (*pemunya yang sah*). As decided by this court in *Mehdi Dadashi Havadaragh*, an unnecessarily restrictive interpretation ought not to be accorded to the words specified in s 128(2). Further, under s 2 of the Act, the word 'owner' includes 'any person (other than an officer of customs acting in his official capacity) being or holding himself out to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or having any control of, or power of disposition over, the goods. There was thus no merit in the defendants' averment that the plaintiff must be 'pemunya yang sah' and that 'rujukan ke mahkamah hanya akan dibuat setelah tuntutan pemunya yang sah menuntut barangan tersebut dalam masa satu bulan dari tarikh penyitaan barangan tersebut'.

**[35]** In our judgment, the written claim made by the plaintiff's solicitor on behalf of the plaintiff was a valid claim as provided under sub-s 128(2) of the Act, particularly when the defendants had not objected nor disputed the notice to claim from the solicitors on behalf of the plaintiff at any point in time. Further as stated earlier, it is an undisputed fact that the seizure notice issued under s 114 of the Act was served by the first defendant on the plaintiff itself. In the circumstances, we found that the learned judicial commissioner erred when she ruled that the claim by the plaintiff vide its solicitor' letter was not a valid claim for the said goods.

**[36]** The defendants admitted that the said goods were seized on 9 November 2015 (see *rekod rayuan Jld* 1: p 47 at para 11). Vide a letter dated 19 November 2015, which was well within the one calendar month from the date of the seizure, the plaintiff made a claim to the said goods. Even if one were to take the notice of seizure dated 27 November 2015, the plaintiff had again made its written claim vide a letter dated 30 November 2015, also within the prescribed time.

**[37]** In the light of the authorities quoted earlier, we ruled that pursuant to sub-s 128(3) of the Act, where a written claim is made by the plaintiff for the

said goods within one calendar month from the date of seizure and where no prosecution is commenced in respect of the said goods within the same period of time, then on the expiration of the one calendar month from the date of notice of claim, the defendants shall release the goods or refer the claim to the magistrate court. Since the defendants had failed to do either, we found that the defendants have failed to observe the statutory requirements under s 128 of the Act.

**[38]** The learned judicial commissioner, with respect erred in her finding that the plaintiff's application was premature and misconceived as the senior officer of customs has yet to decide on forfeiture of the goods and that the director general may only direct the senior officer of customs to refer the matter to court when the senior officer of customs had made a decision that the goods are deemed forfeited and the senior officer refers the matter to the director general for his directive.

**[39]** We opined that there need not be a decision by the senior officer of customs that the goods are deemed forfeited as the forfeiture occurred by operation of law, namely when the three situations stated in sub-s 128(1)(a)–(c) did not occur before the expiration of one month from the date the said goods were seized. It is expressly provided under sub-s 128(1) of the Act that the goods shall not be taken or deemed to be forfeited if there was a written claim made by any person asserting that he is the owner within one calendar month from the date of seizure. And if the goods were deemed forfeited, then the issue of referring the matter to court did not arise.

**[40]** At this juncture, it is perhaps useful to quote the observation made by David Wong Dak Wah J (as he then was) in *Hock Huat Chan*, the case relied upon by the defendants:

> To recap, the Customs Act provides that when goods are seized and there is no prosecution, the owner of the goods must make a written claim for the ownership within one calendar month from the date of the seizure. Failure to do so will result in the seized goods being forfeited. If a written claim is made, it is referred to a magistrate who will conduct a hearing to decide whether the seized goods are the subject matter of any customs offence.

Although the decision of the High Court in *Hock Huat Chan*, was reversed by this court where this court held that there was no contravention of the Act in respect of the forfeiture of the goods (see *Assan bin Mohammad & Ors v Hock Huat Chan Sdn Bhd* [2013] 5 MLJ 76), the above observation remained and was not disturbed.

**[41]** Premised on the foregoing, the appeal was allowed with costs and the case remitted to the High Court for assessment of damages under prayer 2 of the plaintiff's application.

*Appeal allowed with costs and case remitted to the High Court for assessment of damages under prayer 2 of the appellant's application.*

Reported by Nisha Paran